concession would not prevent a conveyance, purporting to transfer unconditionally the whole fee, from being void. If, then, the settlor may prevent absolutely a purchaser of such estate from obtaining title, it seems to follow that he may impose a condition precedent to alienation, the happening of which is necessary before the purchaser obtains title. The Kentucky court here follows a previous decision on the same will to this effect. *Cf. Bell* v. *Mitchell*, 17 Ky. Law Rep. 1334.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

SPECIFIC PERFORMANCE OF NEGATIVE AGREEMENTS IN AFFIRMATIVE CONTRACTS. — An attempt in a recent article to define more narrowly the limits of equity's jurisdiction in the enforcement of negative clauses in affirmative agreements involves the elimination of the doctrine for which the leading case of Lumley *v.* Wagner (1 De G., M. & G. 604) stands. *Specific Performance by Injunction*, by Clarence D. Ashley, 6 Columbia L. Rev. 82 (Feb., 1906). The position is taken that if equity cannot directly bring about a complete performance of the contract, it should never intervene to compel part performance only. In the view of the writer, this rule would not prevent an injunction issuing in cases of contracts of which the negative part alone remained to be performed; of contracts of which the affirmative part, though executory, was capable of enforcement; or of contracts in which the affirmative agreement, though executory and unenforceable, was on the way to fulfilment. It would, however, prevent relief on the negative side whenever an affirmative, unenforceable contract was also broken. It is contended that the earlier cases support this distinction, and that Lord St. Leonards in Lumley *v.* Wagner misunderstood them; but the present interpretation of these authorities is too strained to be conclusive. On principle, two arguments are developed in support of the proposition presented. It is said, in the first place, that equity in enforcing a negative agreement which is connected with an unperformed, unenforceable affirmative clause, is attempting to do indirectly what it has denied its power to do directly. Undoubtedly one effect is a moral suasion of the defendant to perform the rest of his contract; but, for instance, where he has covenanted not to serve any one other than the plaintiff, he has his choice also of remaining idle or of going into some other occupation. Nor is the possible indirect result that for which the injunction is sought; rather is it the prevention of affirmative harm to the plaintiff, which the employment by a rival of the plaintiff's great prima donna, for example, would effect, irrespective of the breach of the affirmative agreement. In the second place, Dean Ashley claims that injustice is likely to flow from granting part performance when the obligation as a whole is unenforceable. To clinch his point, the writer cites Montague *v.* Flockton (L. R. 16 Eq. 189), in which a manager was allowed an injunction, although he had already incapacitated himself from performing by filling the defendant's place. Under the special circumstances the plaintiff had no equity, and the case is wrong in any view. But if there are situations where equity can aid without doing injustice, why should it not do so?

In England the trend is probably in the direction of Dean Ashley's proposition. See *Metropolitan, etc., Co.* v. *Ginder*, [1901] 2 Ch. 799, 805. In the United States, however, the tendency is to give partial relief, when complete enforcement is impossible, on the general equitable principles relating to the specific performance of other contracts. Even in the absence of express negative clauses, it is recognized that every contract contains an implied agreement to do nothing inconsistent with its completion, and when the breach of this implied restriction causes positive harm other than that resulting from the breach of the affirmative part alone, the usual test as to the inadequacy of the legal remedy

is applied. See *Carter* v. *Ferguson*, 58 Hun (N. Y.) 569; *Duff* v. *Russell*, 60 N. Y. Super. Ct. 80; affirmed 133 N. Y. 678. Arguing for the moment from Lumley *v.* Wagner as a basis, Dean Ashley advances the novel proposition that under the theory of that case no difference should be made between a great and an obscure actor, on the ground that men differ as much as land. The truth of this statement may well be doubted; from a practical standpoint a manager rarely attaches importance to the individuality of his "supers." But granting that the argument might apply were the question of enforcing a contract for personal service open, it is of no weight in the case of a negative agreement: for the damages are manifestly adequate, because nominal, unless the actor is of sufficient ability to attract patrons to his new manager to the affirmative harm of the plaintiff.

Of course, negative as well as affirmative contracts will not be enforced, even after a *prima facie* case has been made, if unfairness would result. But to argue that because of such possible unfairness an injunction should never issue in negative contracts is practically to argue that no specific performance of affirmative contracts should ever be granted. There is some force in the suggestion that Lumley *v.* Wagner on its special facts exhibits a lack of mutuality, but this objection would be present only in a limited class of cases, and involves considerations independent of the general question as to enforcing negative agreements. To avoid the injustice apparent in Montague *v.* Flockton, the injunction should always be conditional on the plaintiff's continuing willingness to perform his part of the contract. It is interesting to note that, as the writer includes within the class wherein he would permit enforcement of negative covenants cases where the affirmative cause is still executory, though unbroken, he is obliged, in order to avoid the destruction of his distinction if later a breach should occur, to make the injunction conditional on the continuing performance of both parties. This gives the curious result that under the rule advocated the defendant could get out of performing his negative covenant by simply breaking his affirmative agreement also.

MIXED QUESTIONS OF LAW AND FACT; THE FALSE PASSPORTS CASE.— A novel case, the importance of which has perhaps been overlooked, was decided by the King's Bench last year. *Rex* v. *Brailsford*, [1905] 2 K. B. 730. The defendants, A and B, had by combination obtained from the English Foreign Office a passport, which, though ostensibly for B, was in fact intended for C's use in Russia. An indictment was framed charging A and B with acts "tending to the public mischief." The court, as matter of law, held correct a ruling by the trial judge that the acts tended to public mischief. The dangers of the decision are emphasized in a recent article. *The False Passports Case*, by Herman Cohen, 22 L. Quar. Rev. 34 (Jan., 1906). It is urged that it is anomalous to withdraw from the jury an essential averment of the indictment, such as the lengthy argument shows this clause to be. A general verdict must of necessity always involve a question of law and fact; if the admitted facts are capable of two views, the jury must decide between them. An exception to the general rule existed formerly in libel cases, which afford an analogy to the present question. In such cases the judge used to say, "Prove what the defendant said, and I 'll tell you whether he is guilty of libel"; to-day Lord Alverstone says, "Prove what the defendant did, and I 'll tell you whether his acts constitute public mischief." Fox's Libel Act (1792), supposedly declaratory legislation, in giving a jury the power of bringing in a general verdict of guilty or not guilty upon the whole matter put in issue before them, made the procedure in libel similar to that in other crimes. The jury are as capable of judging whether certain acts tend to the public mischief as whether certain writing holds a man up to hatred, ridicule, or contempt. Though a judge in theory probably has the power to pass upon a new combination of circumstances, provided in so doing he follows principles already established, yet to attempt now